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No. 86-367

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

NEW MEXICO TAXATION
AND REVENUE DEPARTMENT,

Petitioner,

v.

RAMAH NAVAJO SCHOOL BOARD, INC.
AND
LEMBKE CONSTRUCTION COMPANY, INC.

Respondents.

BRIEF OF THE STATES OF CALIFORNIA, FLORIDA, IDAHO, INDIANA, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, PENNSYLVANIA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI CURIAE

The states submitting this brief are concerned that the decision below may mark the beginning of widespread effort by taxpayers to obtain attorneys' fees under 42 U.S.C. § 1988, in state tax disputes involving federal claims. The decision below may also mark the beginning of an effort to obtain attorneys' fees in any type of case, whether it involves state taxes or not, in which a state statute is invalidated on the grounds of implied preemption under a federal statute. It is thus the potential breadth of the lower court's decision which prompts this brief.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS THE IMPORTANT ISSUE OF WHETHER 42 U.S.C. §§ 1983 AND 1988 ARE APPLICABLE TO TAX DISPUTES AT ALL

Until quite recently, the 1976 amendment to 42 U.S.C. § 1988, allowing attorneys' fees in civil rights cases brought pursuant to § 1983, presented no problem for the states in tax litigation. So far as we can tell, it was simply not invoked by taxpayers even when they had prevailed against a state on federal grounds.

This state of affairs, however, has drastically changed. And the change can be traced back to a trilogy of cases, decided by this Court in the early 1980's, which struck down, on grounds of federal preemption, state taxes upon non-Indians engaged in business dealings with an Indian tribe or its members. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *Central Machinery v. Arizona Tax Commission*, 448 U.S. 160 (1980), and *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). In each of these cases, the taxpayer has subsequently requested attorneys' fees, with decidedly mixed results.

In *White Mountain Apache*, the Court of Appeals for the Ninth Circuit has denied attorneys' fees. See *White Mountain Apache Tribe v. Williams*, ___ F.2d ___, No. 81-5348 (9th Cir. Aug. 20, 1986). In *Central Machinery*, the Arizona Court of Appeals awarded attorneys' fees, but the Arizona Supreme Court has granted the state's petition for review, and has not yet issued a decision. See *Central Machinery Co. v. State of Arizona*, Supreme Court No. 18493-PR. And in *Ramah*, which is the subject of this petition, the New Mexico Court of Appeals has granted attorneys' fees.

The impact of the confusion stemming from these differing results will not be confined to tax litigation involving Indians, or even to tax litigation generally. Under the approach of the New Mexico Supreme Court, attorneys' fees could be awarded in *any* case in which a state statute

involving taxation or any other type of exercise of state power is found to be impliedly preempted by a federal statute or regulation. This aspect of the overall problem is discussed in New Mexico's Petition for Certiorari—a discussion with which we fully concur and which, we submit, provides by itself sufficient reason for granting review.

Our focus here, however, is upon an additional aspect of the problem, directly involving the specific area of state taxation and raising a critical threshold issue. Simply stated, that issue is: Whatever might be the rules for applying these statutes in other contexts, do §§ 1983 and 1988 apply to tax litigation at all?

The federal grounds for challenging a state tax can take various forms. The grounds might be the Commerce, Due Process or Equal Protection Clauses. Or the grounds might involve a federal statute which, by its terms, directly prohibits certain types of state taxation, however ill-defined and ambiguous the scope of the prohibition might be. See *e.g.*, 49 U.S.C. § 1513(d) and *Western Airlines v. S.D. Board of Equalization*, No. 85-732, prob. juris. noted Feb. 24, 1986. Finally, as here, and as in *Central Machinery* and *White Mountain Apache*, the grounds might involve, not a direct statutory prohibition, but a federal preemption of state taxing power derived by implication from a federal statute or regulation.

But necessarily presented in this case is the question of whether tax litigation involving federal grounds is simply outside the scope of §§ 1983 and 1988, no matter what form those federal grounds might take.

The suggestion that these statutes do not apply to tax litigation at all might appear to be, at first glance, rather odd. After all, as noted in *Fair Assessment in Real Estate Association v. McNary*, 454 US. 100 (1981):

> Obviously, § 1983 cut a broad swath. By its terms, it gave a federal cause of action to prisoners, taxpayers, or anyone else who was able to prove that his constitutional or federal rights had been denied by any State.

454 U.S. at 103, 104.

Yet, it is clear that our suggestion of § 1983's inappli-

cability to tax litigation had been accepted by this Court for many years and, until the attorneys' fees issue arose in the trilogy of Indian tax cases, by the lower courts as well. That this is so can be shown by review of the Court's opinion in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). In *Lynch*, the issue before the Court was the applicability of 28 U.S.C. § 1343(3), the jurisdictional counterpart of § 1983. As the court there noted, the "direct lineal ancestor of § 1983 and 1343(3)" is a single statute, § 1 of the Civil Rights Act of 1871, 17 Stat. 13. See 405 U.S. at 545. The critical question in *Lynch* was whether § 1343(3)—and thus § 1983 as well—encompassed only "personal" rights, as opposed to "property" rights. See 405 U.S. at 542. In holding that no such distinction exists under these statutes, the Court reversed the lower court's holding that § 1343(3) applies only to cases involving "personal" rights and not "property" rights. In so holding, the lower court had relied upon a line of cases stemming from an opinion by Justice Stone in *Hague v. CIO*, 307 U.S. 496, 83 L.Ed. 1423, 59 S.Ct. 954.

In attempting to uphold the decision of the lower court, the appellees relied upon cases which are of great importance here. As stated by the Court in *Lynch*:

> The appellees cite three cases decided by this court before *Hague v. CIO*, 307 U.S. 496, that they say, support the limitation of § 1343(3) jurisdiction to claims of deprivation of personal liberties. *Carter v. Greenhow*, 114 U.S. 317; *Pleasants v. Greenhow*, 114 U.S. 323; *Holt v. Indiana Mfg. Co.*, 176 U.S. 68. The appellees also rely on two recent affirmances, without opinion, of decisions by three-judge district courts dismissing § 1343(3) suits on the ground that the rights allegedly infringed were proprietary. *Hornbeak v. Hamm*, 393 U.S. 9, aff'g. 283 F.Supp. 549 (M.D. Ala. 1968); *Abernathy v. Carpenter*, 373 U.S. 241, aff'g. 208 F.Supp. 793 (W.D. Mo. 1962).
>
> All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated juridical interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly. [Quoting 28 U.S.C. § 1341]

> We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. *Dows v. City of Chicago,* 11 Wall 108; *Matthews v. Rodgers,* 284 U.S. 521; *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293; see also *Perez v. Ledesma,* 401 U.S. at 126-127, n. 17 (opinion of Brennan, J.). The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with longstanding judicial policy.

405 U.S. at 542, n. 6.

It is thus clear, under the long line of cases noted in *Lynch,* it was uniformly understood that § 1343(3) and § 1983 simply do not apply to tax disputes.[1]

This understanding seems to have persisted at least until the litigation which culminated in *Moe v. Salish and Kootenai Tribe,* 425 U.S. 463 (1976). In that litigation, an Indian tribe and certain of it members were contesting the application of the Montana cigarette tax to their sales of cigarettes to non-Indians. The three-judge district court had found § 1343(3) jurisdiction with respect to the claims of the individual tribal members. See 392 F.Supp. 1297. As stated by this Court:

> The District Court went on to find jurisdiction over the individual Indian plaintiffs in both actions on the basis of 28 USC § 1343(3), together with their allegation that these taxes deprived them of a right secured by the Commerce Clause. Noting that § 1362 by its terms goes only to an "Indian tribe or band," the State has argued that to hold § 1341 inapplicable merely because the state tax is attacked on constitutional grounds virtually strips it of force and is contrary to other federal-court decisions: Bland v. McHann, 463 U.S. F2d 21 (CA5 1972), cert denied, 410 US 966, 35 L Ed 2d 700, 93 S Ct 1438 (1973); American Commuters Assn., Inc. v. Levitt, 405 F2d 1148 (CA2 1969). *Cf. Lynch v Household Finance Corp.* 405 US 538, 542 n 6, * * * (1972).

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[1]It should be noted that the three pre-*Hague* cases cited in this opinion, *viz., Carter, Pleasants,* and *Holt,* all expressly construed not only § 629 Rev. Stat., the immediate predecessor of § 1343(3), but § 1979 Rev. Stat. as well, the immediate predecessor of § 1983. This illustrates the parallel scope of the two statutes.

425 U.S. at 475, n. 14 (emphasis supplied).

Though aware of the line of decisions discussed in footnote 6 of *Lynch*, the Court expressly declined to review the correctness of the district court's holding that § 1343(3) was applicable. For it immediately went on to state:

> The Tribe's brief does not discuss this aspect of the District Court's holding. We need not decide this question, however, since all of the substantive issues raised on appeal can be reached by deciding the claims of the Tribe alone, which did bring this action in the District Court under § 1362. See n 7, supra. Cf. California Bankers Assn. v Shultz, 416 US 21, 39 L Ed 2d 812, 94 S Ct 1494 (1974). Any further proceedings with respect to refund claims by or on behalf of individual Indians, see n 7, supra, would not appear to implicate § 1341.

Ibid.

The reference in *Moe* to 28 U.S.C. § 1341, the Tax Injunction Act, brings into focus what is at stake, as a practical matter, if § 1983 is found to be applicable to tax disputes. After *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981), § 1983 cannot be used as a vehicle to avoid the impact of § 1341, which will thus relegate most taxpayers challenging a state tax to the state courts.[2] The only exceptions would appear to be Indian tribes and the United States, which are not subject to the bar of § 1341 (see *Moe, supra*) and railroad companies suing pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 54, 49 U.S.C. § 11503, which removes for such companies the § 1341 bar. Thus, *all* taxpayers in state courts, and Indian tribes and railroad companies in either federal or state courts, will find the door open for attorneys' fees claims if § 1983 is found applicable to tax disputes and if § 1983 is not otherwise restricted in its scope.

The question of the applicability of § 1983 to tax dis-

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[2]The Court's opinion in *McNary* appears to assume, we would admit, that absent § 1341, § 1983 would be applicable to tax litigation. This assumption arguably adds to the uncertainty because it is obviously inconsistent with the cases cited in footnote 6 of *Lynch*.

putes is, accordingly, of great importance to the states. And although the answer to that question was once clear, it no longer seems to be so. This case provides the opportunity for providing the definitive answer which the lower courts and the litigants in state tax cases very much need.[3]

CONCLUSION

For the reasons given above, the Petition for Certiorari should be granted.

Respectfully submitted,

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[3]The opportunity for a definitive answer may have been provided in *Spencer v. S.C. Tax Commission*, ___ U.S. ___, 52 L.W. 4431 (1985); but because the judgment was affirmed by an equally divided court, no opinion was issued.